No. 89-624

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MAISLIN INDUSTRIES, U.S., INC., *ET AL.*
v.
PRIMARY STEEL, INC.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

JOINT BRIEF FOR AMICI CURIÆ IN SUPPORT OF RESPONDENTS

Daniel J. Sweeney*
1750 Pennsylvania Ave. NW
Washington, DC 20006
Tel. (202) 393-5710

Counsel for National Small Shipments Traffic Conference, Inc. and The Health and Personal Care Distribution Conference, Inc.

Frederic L. Wood*
Nicholas J. DiMichael
Richard D. Fortin
Helene P. Long
1275 K Street, NW
Washington, DC 20005
Tel. (202) 371-9500

Counsel for The National Industrial Transportation League

Jan S. Amundson
General Counsel
Quentin Riegel
Deputy General Counsel
1331 Pennsylvania Ave. NW
Suite 1500, N. Lobby
Washington, DC 20004
Tel. (202) 637-3058

Counsel for National Association of Manufacturers

*Counsel of Record

April, 1990

QUESTION PRESENTED

In an action by a motor common carrier subject to the provisions of the Interstate Commerce Act to recover its tariff charges, does a shipper have a legal defense that it is entitled to pay less than the carrier's published rates filed with the Interstate Commerce Commission, where a district court upholds an ICC ruling that collection of the tariff charges would be an unreasonable practice in violation of the Interstate Commerce Act?

TABLE OF CONTENTS

Table of Authorities

Administrative Decisions

Statutes

Miscellaneous

No. 89-624

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MAISLIN INDUSTRIES, U.S., INC., *ET AL.*
v.
PRIMARY STEEL, INC.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

JOINT BRIEF FOR AMICI CURIÆ IN SUPPORT OF RESPONDENTS

The National Industrial Transportation League, National Small Shipments Traffic Conference, Inc., Health and Personal Care Distribution Conference, Inc. and National Association of Manufacturers (herein referred to as "Shipper Associations"), pursuant to Rule 37.3 of the Rules of this Court, submit this joint brief as *amici curiæ* in support of respondents. All parties have consented to the filing of this brief.

INTEREST OF AMICI CURIÆ

The membership of The National Industrial Transportation League ("League") is comprised of approximately 1300 shippers and groups and associations of shippers conducting industrial and/or commercial enterprises, large, medium and small, in all states of the Union. The members of the League are substantial users of transportation by motor common carrier. It is estimated that League members, directly or indirectly, are responsible for

the routing of approximately 80 percent of the nation's freight.

National Small Shipments Traffic Conference, Inc. is an association with approximately 275 shipper members throughout the United States. The Health and Personal Care Distribution Conference, Inc. has a membership of approximately 70 companies which manufacture and ship drugs, medicines and personal care items throughout the nation. The members of these Conferences ship primarily via motor common carriers.

National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of over 13,000 companies and subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of all the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. NAM and these councils are vitally interested in the resolution of the issue of unjustified claims arising from rates negotiated with the motor carriers that serve their members.

The Shipper Associations, *inter alia*, participate actively before administrative, judicial and legislative bodies to protect the interests of their shipper members. The League, with the support of the other Shipper Associations and the shipping community in general, petitioned the Interstate Commerce Commission ("ICC") to institute Ex Parte No. MC-177, *The National Industrial*

Transportation League – Petition for Rulemaking – Negotiated Motor Common Carrier Rates, 3 I.C.C.2d 99 (1986), *clarified and modified*, 5 I.C.C.2d 623 (1989) [hereafter cited as "*Negotiated Rates*"]. In these decisions, the ICC adopted a policy stating that it would consider, on a case-by-case basis, whether it would be an unreasonable practice, and thus a violation of the Interstate Commerce Act, for a motor common carrier to collect an asserted undercharge claim when the claim arose because of the carrier's failure, due to oversight, misfeasance or malfeasance, to publish tariffs reflecting rates agreed to with the shipper, when the carrier had represented to the shipper that the agreed-to rates were in fact the legally effective rates. The Eighth Circuit's decision under review involves the application of the ICC's policy statement to the facts of a particular case.

The National Industrial Transportation League, National Small Shipments Traffic Conference, Inc., The Health and Personal Care Distribution Conference, Inc., and the National Association of Manufacturers, as *amici curiæ*, support the respondents in this case.

STATUTES INVOLVED

In addition to the statutes cited in the briefs of petitioners and supporting *amici*, this case involves 49 U.S.C. §11705(b)(3); §11706(c)(2).

Section 11705(b)(3) provides:

> A common carrier providing transportation or service subject to the jurisdiction of the

Commission under subchapter II or IV of chapter 105 of this title or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

Section 11706(c)(2) provides:

A person must begin a civil action to recover damages under section 11705(b)(3) of this title within 2 years after the claim accrues.

SUMMARY OF ARGUMENT

The Interstate Commerce Commission has been given statutory authority to determine if a particular course of conduct by a motor common carrier is an unreasonable practice that violates the Interstate Commerce Act. Recognizing the fundamental changes occurring in the motor carrier industry, the ICC made a finding that it would be an unreasonable practice to allow the collection of a higher tariff rate than the rate agreed upon when a motor carrier provided transportation services after offering that rate to a shipper who relied, in good faith, on an understanding that the carrier would file the agreed rate in a tariff at the ICC.

When the ICC determines that a particular course of conduct by a motor carrier is an unreasonable practice, the Act allows a shipper to recover damages for the injury caused by the violation. Under the doctrine of primary jurisdiction, any court considering a claim that a motor carrier's conduct is an unreasonable practice must refer that issue to the

ICC for consideration before determining whether damages should be awarded.

ARGUMENT

A. The Commission Has Correctly Construed Its Statutory Authority to Determine Whether Rates Claimed as Undercharges Are Unreasonable or Are Based Upon Unreasonable Practices.

What is at stake in this case is the interplay between two separate provisions embraced in a single statutory scheme, the Interstate Commerce Act. On the one hand, there is a provision which states that a carrier shall file its rate in a tariff with the Commission. On the other hand, in equally plain language, another provision states that all filed rates and the practices which affect them must be reasonable. It is entirely appropriate that the agency charged with the responsibility for administering the statute be given due deference to interpret and balance those provisions. Since the Commission has adequately considered and reasonably balanced two sections of the Act committed to its jurisdiction, its construction of the statutory scheme is entitled to deference. *K Mart Corp: v. Cartier, Inc.*, 486 U.S. 281, __, 100 L.Ed.2d 313, 324 (1988); *Chevron, U.S.A., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

Petitioners rest their case upon the premise that, when motor carriers claim that undercharges are due from their shippers, under the filed rate section of the Interstate Commerce Act (Act), 49 U.S.C. §10761(a), such charges are collectible

whether or not they are based upon rates that are being charged as a result of unreasonable practices. They concede that, under the Act, rates and practices must be reasonable.[1] But they argue that the Commission must remedy unreasonable practices before a shipment is made and that, once a shipment moves, there is no remedy for an unreasonable practice. Stripped to its bare essentials, the petitioners are claiming a statutory right, if only by default, to collect rates that are a result of unreasonable practices.

However, the Interstate Commerce Act is a balanced statute. It gives the carrier the responsibility to publish and collect the rates in its

---

1 Although elsewhere largely denied, petitioners at one point do recognize that the statute contemplates that a lawful unfiled rate can prevail over an unlawful filed rate:

> Congress has provided a comprehensive scheme of rate regulation and has seen fit in limited and narrow circumstances to specifically define instances where the filed rate provisions are not applicable.

Petitioners' brief, p. 8. Even this begrudging concession exceeds that of the *amici* supporting petitioners' cause who argue uniformly that a filed rate is utterly inviolate and beyond the basic and fundamental scrutiny of the ICC. But in elevating the filed rate to singular importance, petitioners' *amici* ignore or fail to understand basic transportation law and logic: "reparations proceedings inevitably involve a refund [or waiver] from published tariffs regardless of any provision in the Act preventing the carrier from making such refunds [or waiver] personally. *Middlewest Motor Freight Bureau, Inc. v. United States*, 433 F.2d 212, *cert. denied*, 402 U.S. 999 (1971).

tariff, but *also* requires that such rates be reasonable and not be affected by an unreasonable practice. *Compare* 49 U.S.C. §10761(a) *with* 49 U.S.C. §10701(a). The court of appeals correctly applied *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915), in which this Court clearly articulated the classic statement that, on the one hand, a shipper was not permitted to deviate from a carrier's published tariff rate, but that, on the other hand, a shipper could have the published rate set aside by invoking the reasonableness jurisdiction of the ICC.[2] *Accord Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 453 (1945); *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 384 (1932) *Keogh v. Chicago & N. W. Ry. Co.*, 260 U.S. 156, 163 (1922).

Vast numbers of rates are now being filed at the Interstate Commerce Commission every day. Because rates may be, and regularly are, filed at the Commission on one day to become effective the next, the shipper, as a practical matter, must depend

---

2 In addition to the opinion on review, the Ninth Circuit has affirmed application of the Commission's policy statement in *West Coast Truck Lines, Inc. v Weyerhaeuser Co.*, 893 F.2d 1016, 1028 (9th Cir. 1990). In *Delta Traffic Service, Inc. v. Appco Paper & Plastics Corp.*, 893 F.2d 472, 475 (2d Cir. 1990), the court of appeals reversed and remanded a district court order that had declined to refer a negotiated rate claim to the Commission for a ruling on reasonableness.

upon the rate as quoted by the carrier.[3] The shipper has no certain knowledge of the rates filed until after the shipment has moved.

If the prohibition against unlawful rates based on unreasonable practices were read out of the Act, this would confer a license upon aggressive collection agents, acting for bankrupt carriers, to create claims and pursue shippers unreasonably and relentlessly.[4] That is exactly what is at stake in this case: the collection agents are claiming over $100 million in freight rates that were never contemplated to be assessed on the shipments.[5] Indeed, had these carriers attempted to assess such charges initially, the shipments would not have been tendered to them, because other carriers generally offered rates

---

3 In accordance with the Congressional policy of the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (July 1, 1980), the ICC has allowed a wide variety of motor carrier price and service options to be offered, and allows rate discounts to be made effective on one day's notice. *See Negotiated Rates*, 5 I.C.C.2d at 631-634.

4 One amici brief in support of petitioners aptly describes what is currently occurring: collection auditors follow the practice of "sifting through" the accounts of bankrupt carriers. *Amici curiæ* brief of Oneida Motor Freight, *et al.* at 2.

5 For example, one carrier alone, Overland Express, Inc., is alleging that it has $20,000,000 in undercharge claims that it is pursuing. *Amicus curiæ* brief of Overland Express, Inc. at 2.

at the same level as were originally billed and collected.[6]

The public policy arguments that petitioners assert are misstated. Petitioners argue broadly that shippers should not "secretly agree to rates different from those contained in a tariff ... [as such agreed rates would lead to] public injury for departures from lawful rates." Petitioners' brief at 7, 10.

But the Commission's policy statement is not designed to promote or protect "secret" rates.[7] The Commission has concluded that an unreasonable practice finding can be made *only* in cases where the carrier offered a rate to the shipper and it was reasonably understood in good faith that the carrier would file that rate in a tariff with the Commission.[8]

---

6 In the instant case, Maislin offered to meet the rates of another carrier, P&NE Trucking, which had been handling the freight for Primary Steel. App. to Petition for Certiorari, p. 31a.

7 In the Commission's decision in *Negotiated Rates*, 5 I.C.C.2d at 631, it stated:

> In fact, there has been nothing in the records of the cases we have reviewed to suggest that it was the intent of the parties to establish secret, discriminatory rates.

8 The Commission's policy statement articulated the elements for a finding of unreasonable practice to be:

> a course of conduct consisting of: (1) negotiating a rate; (2) agreeing to a rate that the shipper reasonably relies upon as being

If an agreement were made to keep rates a secret, neither the Commission nor these shipper groups would advocate statutory protection. But that is not the case here. Rather, the real "public injury" will occur if the bankrupt carriers and their agents are allowed to use the filed rate provision to realize windfall profits by collecting higher rates from shippers than those that were mutually understood to apply when the shipments were tendered.[9]

Petitioners embellish their "public interest" argument by asserting that the Commission's exercise of its unreasonable practice jurisdiction "is unfair to the remainder of the public which pays lawful tariff rates" because "[t]he dilemma now faced by recipients of secret rate agreements results from their own lack of diligence and ICC failure to enforce the rate [filing] provision of the statute." Petitioners' brief at 30. But it is not the isolated shipper engaged in unlawful practices who is being

---

lawfully filed; (3) failing, either willfully or otherwise, to publish the rate; (4) billing and accepting payment at the negotiated rate for (sometimes) numerous shipments; and (5) then demanding additional payments at higher rates.

Negotiated Rates, 5 I.C.C.2d at 628, n. 11.

9 One amicus suggests that the rights of creditors under the Bankruptcy Code must be given preference. *Amicus curiæ* brief Overland Express, Inc.,at 16-18. But if the motor carrier in whose shoes the creditors and bankruptcy trustee stand had no right under the Interstate Commerce Act to collect these rates, then the creditors can have no better rights.

confronted with these undercharge claims. Every regular customer of the trucking industry is being billed with huge undercharge claims, on shipments made years ago, by collection agents creating freight claims after carriers become bankrupt.[10] Many members of these *amici* associations, which comprise the mainstream of American industry, has been presented with freight claims of this type; and the amounts claimed are growing as additional carriers file for bankruptcy.

What all these claims have in common is that every one of them is premised upon an alleged mistake or omission by the carrier itself. And such claims are brought against shippers whose dealings with the motor carriers fully contemplated that the rates would be filed with the Commission and *not* kept "secret." The shippers acted in good faith reliance that the rates quoted had been or would be

---

10 A review of a selection of the cases decided by the ICC shows that a broad cross-section of businesses are involved in negotiated rates cases. *Amici curiæ* brief of Oneida Motor Freight, *et al.*, App. A. Oneida contends that these cases demonstrate an undue proclivity at the Commission to rule in favor of shippers in negotiated rate cases. *Id.*, at 14-15. In fact, the total of $3 million in undercharges found unreasonable by the Commission in *all* cases presented to it is but a fraction of the $20 million in under charges being pursued by just a *single* bankrupt carrier. *Amicus curiæ* brief of Overland Express, Inc., p. 2. Thus, what the appendix demonstrates is that only a very small portion of undercharge claims are actually litigated under the Commission's policy statement and these cases tend to be ones where the shippers' can prove an unreasonable practice.

published by the carrier, as required by law, for their account prior to the date of shipment.

Petitioners also misstate what the Commission finds to be an "unreasonable practice." They argue that the assertedly unreasonable practice "is the enforcement of a lawful tariff." However, the unreasonable practice consists of the attempt to collect tariff rates at which a shipper did not and would not have tendered the shipment, instead of the rate at which the shipment was tendered and billed. It is worth noting that the historic "filed rate" cases cited by petitioners were rendered at a time when there was only one filed rate for all shippers between two points. Today, between any two points there is normally a plethora of rates for the same shipment. The ICC found this to be a reflection of the Congressional policy of allowing what, in an earlier era of a uniform rates between two given points, would have been viewed as discriminatory. *Negotiated Rates,* 5 I.C.C.2d at 625, 632-33.

Ironically, the "filed rate" which the bankrupt carrier seeks is usually a rate that no regular shipper paid at the time, as all receive some discount. *Negotiated Rates*, 5 I.C.C.2d at 632-33. Thus, rather than causing a discrimination by applying the agreed rate, the Commission is *preventing* the discrimination that would occur by imposing the higher filed rate. The policy considerations underlying the concern with "discrimination," which is the touchstone of the filed rate doctrine, now militate in favor of applying the agreed rate in the context of today's tariffs with shipper-specific rates.

B. Shippers Have a Cause of Action for Damages Caused by a Motor Carrier's Violation of the Interstate Commerce Act.

The Interstate Commerce Act provides a cause of action against motor carriers "for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle." 49 U.S.C. §11705(b)(3). This provision was recodified in 1978 from former section 204a(5) of the Act, 49 U.S.C. §304a(5) (1965).[11] Before recodification, it provided that:

> The term "reparations" as used in this section means damages resulting from charges for transportation services to the extent that the Commission, upon complaint made as provided in section 216(e) of this part, finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial.

In the face of the statute and its history, petitioners argue that shippers faced with actions for undercharges have a defense available for unreasonably high rates but not for rates which

---

11 Revised Interstate Commerce Act, 92 Stat 1451 (Oct. 17, 1978). Section 204a(5) was added by Pub. L.89-170, §5, 79 Stat. 651 (1965).

result from unreasonable practices.[12] But it is clear from both the context and the legislative history of the Act, that the phrase "unjust and unreasonable" in former section 204a(5) was intended to encompass damages resulting from both unreasonably high rates *and* rates which were found to be "unjust" by the Commission due to a carrier's unreasonable practices. Former section 216(a), 49 U.S.C. §316(a), now 49 U.S.C. §10701(a), imposed on motor common carriers the duty to establish and observe both reasonable rates and reasonable practices. In addition, former section 216(e), 49 U.S.C. §316(e) (which was specifically referred to in section 204a(5)), authorized the Commission to hear and decide complaints with respect to the unreasonableness of both the rates of motor common carriers and "any classification, rule, regulation or *practice* ... affecting" such rates (emphasis added).

Petitioners contend that a rate is "unjust and unreasonable" within the meaning of the reparations statute only if the rate exceeds a reasonable maximum. Such a view incorrectly suggests that shippers have no post-shipment remedy in damages for any other violation of the duties imposed on motor common carriers by the Act. This is an unacceptably cramped view of the ICC's long-standing authority to prohibit carriers from

---

12 This contention was not considered or decided in this case by either the court of appeals or the district court because petitioners present it here for the first time. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) (Court does not consider questions not raised in court of appeals.)

extracting rates that are unjust and unreasonable because of a related but unlawful rule, classification or practice.

The legislative history of the 1965 amendment discloses Congressional intent to enact a motor carrier reparations provision that differed from the existing rail carrier reparations provisions, *but not* in the manner asserted by petitioners. The 1965 amendment was deemed necessary because of this Court's decision in *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959), which led the ICC repeatedly to "recommend that sections 204a and 406a be amended to make common carriers by motor vehicle and freight forwarders, respectively, liable for the payment of damages in reparation awards to persons injured by them through violations of the [A]ct."[13]

The House Report accompanying H.R.5401 cogently explains the purpose of the legislation. Shippers using rail or water carriers traditionally "have had a procedure for securing damages arising from violations of the Interstate Commerce Act either by way of complaint filed against the carrier with the Commission or in the courts, while those shipping by motor carrier or freight forwarder had assumed they had a similar, though more limited, remedy by proceeding against the carrier in the

---

13 74th Annual Report of the Interstate Commerce Commission, p. 190 (1961). The same recommendation was made in the Commission's 75th Annual Report, p. 192 (1961); 76th Annual Report, p. 203 (1962); 77th Annual Report, at 19-20 (1964); 78th Annual Report, p. 70 (1964).

courts. In a 1959 Supreme Court decision *[T.I.M.E.]* this latter *procedure* was taken away, the Court holding that neither the courts nor the Commission had authority in this area."[14]

In order to respond to T.I.M.E., two types of proposals were put before Congress. "Some proposals have looked toward making the *procedures* identical in the case of all modes of transportation. Other proposals suggest return simply to the pre-1959 modified reparations for motor carriers and freight forwarders in view of the potentially large number of claims to which they might be subject owing to the predominant carriage of small shipments."[15] Congress adopted the latter approach, a scheme that, in effect, "would permit a court of competent jurisdiction to award reparations to persons *injured through violations of the Interstate Commerce Act* by motor carriers and freight forwarders subject thereto."[16]

---

14 H.R. Rep. No. 253, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 2923, 2925 (emphasis added). *See also Informal Procedures for Determining Motor Carrier and Freight Forwarder Reparation*, 335 I.C.C. 403, 413 (1969).

15 H.R. Rep. No. 253, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 2923, 2925 (emphasis added).

16 *Id.* (emphasis added). 49 U.S.C. §11706(c)(2) (former 49 U.S.C. §304a(2)), provides authority for a civil action to be commenced to recover the damages authorized by §11705(b)(3).

In contrast, petitioners' "cut and paste" version of the legislative history attempts to depict a distinction between reparations for unreasonably high rates and reparations for other violations of the Act. Petitioners' brief at 21-24. In fact, the only distinction between these competing bills was *procedural*. The Commission favored giving shippers the option to file a complaint with (and receive a self-enforcing reparations order from) the ICC itself or to file a civil action. In contrast, under S.1727 and H.R.5401, shippers were required to begin a court action with referral of administrative issues to the Commission. But the substance of the relief of the two approaches was the same.

Numerous interests testified before both the Senate and the House on the differences between the reparations provisions in S.1732 and H.R.5869, which were identical to the existing railroad reparations provisions, and those in S.1727 and H.R.5401, which were subsequently enacted into law.[17] During hearings before the Senate, then-ICC Chairman Webb explained that S.1732 would provide shippers with the option of filing a

---

17 Bills to Amend the Interstate Commerce Act: Hearings on S. 1142 *et al.* Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, 89th Cong., 1st Sess. (1965) (hereinafter "Senate Hearings"). A Bill to Amend the Interstate Commerce Act So As to Strengthen and Improve the National Transportation System, and for Other Purposes: Hearings on H.R. 5401 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong. 1st Sess. (1965) (hereinafter "House Hearings").

complaint with the Commission or a suit in district court, whereas S.1727 would not authorize a shipper to file a complaint with the ICC. Chairman Webb indicated the Commission's preference for S.1732, but also noted that the Commission did not oppose sections 5 and 6 of S.1727.[18]

The legislative history demonstrates that the Commission was by no means alone in this view. Other governmental interests, shippers and competing modes similarly saw the distinction between the competing reparations provisions as limited to whether complaints could be filed directly with the Commission.[19]

Immediately after enactment, the Commission described the legislative proposals and its views on

---

18 Senate Hearings, at 62-63. The Commission made the same representations to the House. House Hearings, p. 31. Testimony at the hearings indicated that opposition to allowing motor carrier reparations claims to be filed directly with the Commission was attributable to a fear that the many less-than-truckload shippers using motor carrier services would file numerous and small reparations claims and that the filing of small claims would be deterred if it was necessary to institute a civil action in the courts. *See, e.g.*, Senate Hearings, at 78, 129; House Hearings, p. 69.

19 Senate Hearings, at 93-95, 129, 158; House Hearings, at 97, 187. Petitioners rely upon an excerpt of a letter from the Comptroller General (quoted by petitioners at pages 22-23 of their brief without citation) which appears in S. Rep. No. 387, 89th Cong., 1st Sess. 12-13. The letter concludes that "the method for obtaining reparations indicated in S. 1727 is not objectionable" although it "does not seem as economical or expeditious as that proposed in S. 1732." *Id.*

the import of the regulatory scheme ultimately adopted by Congress in its 79th Annual Report at 118-119 (1965):

> S.1732 and H.R.5869 were introduced, upon request, to implement [the Commission's] recommendation. An amended version of these bills became part of H.R.5401 and S.1727. Sections 6 and 7 of H.R.5401 would permit a court of competent jurisdiction to award reparations to persons injured through violations of the Interstate Commerce Act by motor carriers and freight forwarders. The Commission recommended a broader provision; that persons injured through such violations be given the option either to file a complaint with the Commission or bring suit in the appropriate district court of the United States. Sections 6 and 7 of H.R.5401 became part of Public Law 89-170.

Petitioners also suggest that the present language in section 11705(b)(3), holding carriers liable for the imposition of rates found by the Commission to be in violation of the Act, cannot be read as being broader than the reparations provision of former section 204a(5). Petitioners' brief at 20 and n. 11. But it should be clear from the analysis of the 1965 amendments that even before the recodification in 1978, Section 204a(5) encompassed both unreasonable rates and unreasonable practices, and the 1978 recodification properly reflects that reading.

The Historical and Revision Notes in the legislative history of the 1978 Revised Interstate Commerce Act clarify the use of the terms "reasonable" and "discrimination" in the recodification.[20] Because a number of terms historically had been used interchangeably throughout the Act, the recodification substituted the term "reasonable" for "just and reasonable" and substituted "discrimination" for "preference," "prejudice," "advantage," and "disadvantage."[21] The history of the recodification quotes the similar finding of the editors of the U.S. Code Service that the terms "unjust discrimination" and "preference and prejudice" have been "used in innumerable instances by the courts and by the Commission as interchangeable" and that there is "similar confusion" in the cases concerning the requirements that a carrier's rates be just and reasonable and that its classifications, regulations and practices be just and reasonable as well.[22] In light of this traditional interchangeable use of these provisions, Congress, in the recodification act, appropriately substituted

---

20 49 U.S.C. §10101 (West Pamphlet 1989), *reprinted in* 1978 U.S. Code Cong. & Ad. News 3022-3023.

21 *Id.*

22 *Id.*

the words "to be in violation of" the Act for the existing broad definition of reparations.[23]

Finally, that Congress intended to encompass both unreasonable rates and unreasonable practices in the 1965 amendments to the Act is supported by examining Congress' view of this Court's decision in *Hewitt-Robins, Inc. v. Eastern Freight-Ways*, 371 U.S. 84 (1962). In *Hewitt-Robins*, the Commission had found that misrouting was an unreasonable practice violative of the provisions of the Interstate Commerce Act. This Court subsequently held that the *T.I.M.E.* decision did not preclude the courts and the Commission (working together under the primary jurisdiction doctrine) from awarding reparations to shippers for such an unreasonable practice, since such judicial/administrative action did not involve the direct determination of the unreasonableness of a rate.[24]

Congress noted that the amendments were designed to restore the procedures used by the ICC before *T.I.M.E.*, but not to affect the right of shippers to recover damages from misrouting under the Hewitt-Robins doctrine." H. R. Rep. No 253, 89th Cong. 1st Sess. 12-13, *reprinted in*, 1965 U.S.

---

23 See Historical and Revision Notes, 49 U.S.C.A. §11705, *reprinted in* 1978 U.S. Code Cong. & Ad. News 3200.

24 *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.* 302 I.C.C. 173, 174 (1957), *dismissed*, 187 F. Supp. 722 (S.D.N.Y. 1960), *aff'd*, 293 F.2d 205 (2d Cir. 1961), *rev'd*, 371 U.S. 84 (1962).

Code Cong. & Ad. News 2931. (*See also* House Hearings at 93-94.) Prior to this Court's decision in *T.I.M.E.*, for many years after enactment of the Motor Carrier Act of 1935, the Commission and the courts provided a reparations remedy to shippers for *any* violation of the Act by motor carriers, including violations of both unreasonable rates and unreasonable practices.[25] Since Congress clearly had no problem with continuing a remedy for one category of unreasonable practices, namely, misrouting under the *Hewitt-Robins* doctrine, it seems illogical that Congress would deliberately exclude from the remedies that it was providing to shippers remedies for other types of unreasonable practices. The legislative history set out in detail above confirms that Congress had no such narrow intent, but rather intended to provide a damages remedy for all unreasonable rates and all unreasonable practices.[26]

C. The Commission and the Courts Each Have a Role to Play in Adjudicating an Unreasonable Practice Defense.

Congress has authorized the agency *alone* to make findings that form the basis of an award of

---

25 *See, e.g., Bell Potato Chip Co. v. Aberdeen Truck Lines*, 43 M.C.C. 337, 341-344 (1944).

26 If Congress had not enacted a statutory reparations remedy in 1965, the common law remedy approved in *Hewitt-Robins* for the unreasonable practice of misrouting would also encompass any other unreasonable practice by which a rate is sought to be collected.

damages to injured shippers in the form of reparations for unreasonable rates or practices. 49 U.S.C. §11705(b)(3); *Hewitt-Robins, Inc. v. Eastern Freightways, Inc.*, 371 U.S. 84 (1962). Likewise, it is abundantly clear that only the *ICC* may make a finding that a particular motor carrier practice is unreasonable, so as to preclude the collection of rates published in the otherwise applicable tariff. *ICC v. Atlantic Coast Line R. Co.*, 383 U.S. 576, 579-80 (1966); *Western Transportation v. Wilson & Co.*, 682 F.2d 1227, 1232 (7th Cir. 1982).[27]

The court below, by referring the unreasonable practice defense raised by respondent Primary Steel to the ICC, recognized the right of shippers being sued by a carrier for undercharges to oppose the claim with a defense that it would be unreasonable under the Act to permit the collection of the otherwise applicable tariff charges. *See ICC v. Atlantic Coast Line R. Co., supra;*[28] *United States v. Western Pacific R. Co.*, 352 U.S. 59, 62-65

---

27 An order authorizing waiver of undercharges is the equivalent of a determination of the amount of reparations or damages. *Informal Procedures for Determining Motor Carrier and Freight Forwarder Reparation*, 335 I.C.C. 403, 414 (1969). *See also Arkansas Fertilizer Co. v. United States*, 193 F. 667 (Comm. Ct. 1911).

28 This case also notes that the limited judicial review sought by any party aggrieved by an ICC's decision after referral is conducted by the referring court, where an action must be commenced against the agency within 90 days after entry of its decision. 28 U.S.C. §1336; *Burlington Northern, Inc. v. Northwestern Steel & Wire*, 794 F.2d 1242, 1246-47 (7th Cir. 1986).

(1956); *General American Tank Car Corp. v. El Dorado Term. Co.*, 308 U.S. 422, 432-33 (1940); *Seaboard System R. Co. v. United States*, 794 F.2d 635, 637-8 (11th Cir. 1986).[29]

The petitioners contend that the courts should have refused to follow the primary jurisdiction doctrine and refer a reasonable practice question raised by the shipper to the ICC. As discussed above, that argument elevates 49 U.S.C. §10761 and the requirement that a filed tariff rate be observed to a role of primacy not found in the Interstate Commerce Act. Unlike some other federal regulatory statutes, the Act now clearly provides for an award of damages in the form of reparations to a shipper for past unlawfulness. This is a critical difference, for example, in considering petitioners' contention that *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), precludes referral of negotiated rates claims to the ICC. Both then and now, the Federal Power Act, unlike the Interstate Commerce Act, has no provision for an award of reparations for past unlawfulness. 16 U.S.C. §§824-824k. The courts could not refer a damage claim to the then-Federal Power Commission for consideration when neither the agency nor the court could award such damages.

---

29 In this case, the Eleventh Circuit approved an ICC finding that the tariff at issue must be considered unambiguous and, therefore, stated the rate otherwise applicable under 49 U.S.C. §10761, but nonetheless affirmed the ICC's finding that it would be an unreasonable practice to allow the carrier to collect the additional freight charges. 794 F.2d at 637-38.

341 U.S. at 250-52. Consequently, the enactment of a motor carrier reparations provision in 1965 renders petitioners' heavy reliance on this Court's decisions in *T.I.M.E.* and *Montana-Dakota* entirely misplaced.

This Court has regarded "the maintenance of a proper relationship between the courts and the Commission in matters affecting transportation to be of continuing public concern." *United States v. Western Pacific R. Co., supra*, 352 U.S. at 63. In light of the pending petition for a writ of certiorari in No. 88-1958, *Supreme Beef Processors, Inc. v. Yaquinto*,[30] and in order to provide a clear direction as to the nature of that relationship for the benefit of all of those courts considering this and similar cases, the Court should reiterate the correct application of the primary jurisdiction doctrine.

---

30 The issue in that case is whether the court of appeals decision in *Supreme Beef Processors, Inc. v. Yaquinto*, 864 F.2d 388 (5th Cir. 1989), correctly refused to refer a negotiated rates case to the ICC.

CONCLUSION

The decision of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

Daniel J. Sweeney*
1750 Pennsylvania Ave. NW
Washington, DC 20006
Tel. (202) 393-5710

Counsel for National Small Shipments Traffic Conference, Inc. and The Health and Personal Care Distribution Conference, Inc.

Frederic L. Wood*
Nicholas J. DiMichael
Richard D. Fortin
Helene P. Long
1275 K Street, NW
Washington, DC 20005
Tel. (202) 371-9500

Counsel for The National Industrial Transportation League

Jan S. Amundson
General Counsel
Quentin Riegel
Deputy General Counsel
1331 Pennsylvania Ave. NW
Suite 1500, N. Lobby
Washington, DC 20004
Tel. (202) 637-3058

*Counsel of Record

Counsel for National Association of Manufacturers

April, 1990